In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FREDERICK RODGERS, APPELLANT,
v.
THE UNITED STATES. } No. 317.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appellant's amended petition filed in the Court of Claims alleges that there is a remainder due him from the United States in the sum of $3,358.13 for his services and certain allowances as rear-admiral in the Navy.

The issues presented are questions of law arising by reason of certain sections of the act of March 3, 1899, commonly known as the "Navy personnel act."

We therefore give the sections applicable in order that the court may have the same in convenient and ready form for reference.

AN ACT to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, That the officers constituting the Engineer Corps of the Navy be, and are hereby, transferred to the line of the Navy, and shall be commissioned accordingly. (See 30 Statutes at Large, page 1004.)

SEC. 7. That the active list of the line of the Navy, as constituted by section one of this act, shall be composed of eighteen rear-admirals, seventy captains, one hundred and twelve commanders, one hundred and seventy lieutenant-commanders, three hundred lieutenants, and not more than a total of three hundred and fifty lieutenants (junior grade) and ensigns: *Provided, That each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier-general in the Army.* Officers, after performing three years' service in the grade of ensign, shall, after passing examinations now required by law, be eligible to promotion to the grade of lieutenant (junior grade): *Provided*, That when the office of chief of bureau is filled by an officer below the rank of rear-admiral, said officer shall, while holding said office, have the rank of rear-admiral and receive the same pay and allowance as are now allowed a brigadier-general in the Army: *And provided further*, That nothing contained in this section shall be construed to prevent the retirement of officers who now have the rank or relative rank of commodore with the rank and pay of that grade: *And provided further*, That all sections of the Revised Statutes which, in defining the rank of officers or positions in the Navy, contain the words "the relative rank of" are hereby

amended so as to read "the rank of;" but officers whose rank is so defined shall not be entitled in virtue of their rank to command in the line or in other staff corps. Neither shall this act be construed as changing the titles of officers in the staff corps of the Navy. No appointments shall be made of civil engineers in the Navy on the active list under section fourteen hundred and thirteen of the Revised Statutes in excess of the present number, twenty-one. (See 30 Statutes at Large, page 1005.)

SEC. 13. That, after June thirtieth, eighteen hundred and ninety-nine, *commissioned officers of the line of the Navy* and of the Medical and Pay Corps *shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army: Provided, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty;* but this provision shall not apply to warrant officers commissioned under section twelve of this act: *Provided further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places: *Provided further*, That naval chaplains, who do not possess relative rank, shall have the rank of lieutenant in the Navy; and that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service. And all provisions of

law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed: *And provided further*, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law: *And provided further*, That nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy. (See 30 Statutes at Large, page 1007.)

RELATIVE RANK BETWEEN OFFICERS OF THE NAVY AND OFFICERS OF THE ARMY.

Section 1466, Revised Statutes, page 256, provides as follows:

The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army shall be as follows, lineal rank only being considered:

The vice-admiral shall rank with the lieutenant-general.

Rear-admirals with major-generals.

Commodores with brigadier-generals.

Captains with colonels.

Commanders with lieutenant-colonels.

Lieutenant-commanders with majors.

Lieutenants with captains.

Masters with first lieutenants.

Ensigns with second lieutenants.

PAY OF OFFICERS OF THE ARMY.

Section 1261, Revised Statutes, provides for pay of major-general, $7,500 per year; brigadier-general, $5,500 per year.

PAY OF NAVY OFFICERS PRIOR TO THE ACT OF MARCH 3, 1899.

By section 1556 of Revised Statutes the pay of rear-admiral was as follows:

When at sea, $6,000; on shore duty, $5,000; on leave or waiting orders, $4,000.

Commodores when at sea, $5,000; on shore duty, $4,000; on leave or waiting orders, $3,000.

COMMUTATION OF QUARTERS.

In lieu of an allowance of quarters a major-general is paid $72 per month, and a brigadier-general $60 per month.

By reason of said "Navy personnel act" the appellant, Frederick Rogers, on March 3, 1899, was promoted from the rank of commodore to the rank of rear-admiral, and it is conceded by him that he was one of the second nine of the eighteen rear-admirals, or one of the rear-admirals embraced in the nine lower numbers of the grade of rear-admirals, and continued as one of such nine lower numbers during all the period of time covered by this case.

APPELLANT'S CONTENTION.

By reason of the following clause in the first proviso of said section 7 the appellant contends that he is entitled to receive the full pay of a brigadier-general from the time of the passage of the act of

March 3, 1899, to June 30, 1899, inclusive, at the rate of $5,500 per year, without any deduction by reason of shore duty, said clause being as follows:

> *Provided, That each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier-general in the Army.*

Inasmuch as rear admirals have the same relative rank as major-generals and the compensation of major-generals is $7,500 per year, appellant further contends that by reason of section 13 of said act he is entitled to receive compensation from and after June 30, 1899, at the rate of $7,500 per year, except forage, less 15 per centum by reason of the services being shore duty.

Appellant further contends that from July 1, 1899, to the date of the commencement of this action in the Court of Claims he is entitled to receive the same amount for commutation for quarters as is allowed major-generals.

DEFENDANT'S CONTENTION.

On behalf of the Government we insist that the clause quoted from the first proviso of section 7 is a piece of special legislation for the purpose of fixing a basis for pay of and applicable to designated and specific officers therein pointed out, to wit, rear-admirals in the nine lower numbers.

That section 13 of the act, which provides for pay of commissioned officers of the line of the Navy, is in general terms and is a general statute.

That section 13 being general in its terms does not

repeal, abrogate, or supersede the special legislation found in the clause quoted from the first proviso of section 7.

That the appellant is entitled to pay from March 3, 1899, to the time of the commencement of this action at the rate of the pay of a brigadier-general, less 15 per centum by reason of his shore service, and is entitled to commutation for quarters at the rate of $60 per month, all of which pay and allowances he has received.

ARGUMENT.

The proviso in section 7 of said "Navy personnel act" is so clearly a special provision which relates to particular officers of a class that it would appear unseemly to present argument in support of the fact. By the terms of said proviso it is seen that it has special reference to certain rear-admirals therein specifically pointed out, and no language could be used to convey the idea of special legislation more forcibly than that which Congress has seen proper to use in said proviso. It is clearly and prominently a piece of special legislation affecting specially designated officers. In order to sustain appellant's contention it is necessary for the court to find that the first proviso of said section 7 is repealed by section 13 of the same act.

It certainly is not to be presumed that Congress would insert a proviso in one section of an act and then repeal that proviso in subsequent general terms inserted in another section of the same act.

There is no expressed intention of Congress found in

section 13 to repeal any part of section 7, and if said section 13 has the effect of repealing the first proviso in section 7, it must be by implication and not by reason of any expressed intention.

It is a well-settled rule that repeals of statutes by implication are not favored, and the principle is recognized by all of the law writers on interpretation and construction of laws and is uniformly followed by the court of last resort of the various States and by this court. As a corollary deduced from the preceding proposition, it has become a universal rule in the interpretation of statutes that subsequent legislation, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the particular and specific provisions of the earlier statute. In support of this corollary, Black, on Interpretation of Laws, says:

> As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating the subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.

The learned author, on page 117, further states:

> So, again, a special act exempting certain property from taxation is not to be considered

> as impliedly repealed by a subsequent general statute imposing taxes generally, although the language of the latter act is broad enough to cover the property exempted by the previous law. * * * Even where two statutes are passed upon the same day, one of which relates to a particular class of cases, and the other is of a more general character, their provisions being repugnant, it is the former which must prevail as to the particular class of cases therein referred to.

Sedgwick on the Construction of Laws, says:

> In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. * * * The reason and philosophy of the rule is that when the mind of the legislator has been turned to the details of a subject and he has acted upon it a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction in order that its words shall have any meaning at all.

(See Sedgwick on the Construction of Statutory and Constitutional Law, p. 97; also see the large number of citations found on pp. 98 and 99 of the work cited.)

In further support of the doctrine that general legislation does not repeal or abrogate special legislation

we cite the 22d Mich. Reps., p. 334, in which the court uses the following language:

> * * * Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are cotemporaneous, as the legislature is not to be presumed to have intended a conflict.

(See also a large number of authorities cited by the court on said page 334.)

Now, keeping in view the fact that the first proviso in section 7 has reference to certain officers therein specifically designated and by its terms is clearly and prominently a piece of special legislation for certain rear-admirals of the whole class of rear-admirals, and applying the foregoing standard of interpretation, it becomes the duty of the court to reconcile any apparent conflict in the two sections, if the same can be done, so as to leave both sections in full force and effect.

We quote from the learned opinion of the Court of Claims in passing upon the question now before this court as follows:

> Section 13 standing alone appears broad enough to justify the claimant's contention, but construing the two sections together as parts of the same act, and keeping in view the canon of

interpretation as to the purpose of the act and the former service, status, and pay of rear-admirals and commodores, we think there is no difficulty in upholding section 7 as permanent legislation not inconsistent with the general provisions of section 13.

By the proviso to section 7 the rear-admirals "embraced in the nine lower numbers of that grade" are segregated from the other officers there named and placed in a separate class for the purpose of fixing their pay; and special provision being made therefor, section 13 must be read with that in view; and thus reading the section, we interpret it to mean that commissioned officers not otherwise specially provided for in the act "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army." This construction is neither new nor novel, but is abundantly supported by authority.

Section 13 is in general terms, and the language there used does not indicate that it was the intention of the Congress to abrogate the special provision made in section 7 for the rear-admirals "embraced in the nine lower numbers of that grade;" and special provision having been made for them it can not be held that a subsequent general statute, much less in the same act, was intended to alter or repeal the special provision so made.

At the time of the passage of the statute under consideration there were six rear-admirals in the United States Navy with the relative rank of major-general

and ten commodores with the relative rank of brigadier-general. The six rear-admirals, as we are informed, had performed their allotted duties in sea service and at foreign posts under the rules and regulations of the Navy, and there were not sufficient rear-admirals to place in charge of foreign stations and to perform sea duty to foreign countries.

Section 1363 of the Revised Statutes provided for ten rear-admirals, but in the appropriation act of August 5, 1882, the number was reduced to six, as above stated. (See Stat. L., 22, p. 286.)

The office or rank of commodore in the Navy had been, to a great extent, abolished by other naval powers, and was not considered of sufficient dignity and significance for an officer representing our Government in diplomatic and social relations with other nations. The rank of commodore in the United States Navy was little above that of captain, and when our Navy Department did not have sufficient rear-admirals to assign to foreign stations or send with fleets to foreign waters, the Department was necessitated to assign commodores and captains to such duties as *acting rear-admirals*, and in such cases they performed the duties of a rear-admiral, signed the reports and documents as such acting rear-admiral, were introduced and received by foreign powers as rear-admirals, and assumed all the responsibilities and performed all the requirements of the office of rear-admiral; yet these officers, while performing these duties and assuming these responsibilities of rear-admirals, received the

compensation of commodores only. A notable instance of a commodore performing such responsible duties is that of Commodore Walker, when placed in charge some years ago of the White Squadron. He was designated as acting rear-admiral, and was received at all ports and foreign stations as rear-admiral, and as such performed the official and diplomatic duties of a rear-admiral. Congress, therefore, by the "Navy personnel act," provided a higher rank for those ten commodores, in order that they might have the full title due them in the performance of their duties and for the purpose of placing them upon an equal standing and conferring upon them an equal dignity with that of foreign naval officers whom their duties necessitated them to meet. Prior to the passage of the "Navy personnel act" vacancies in the rank of rear-admiral were supplied during the time of war from those officers on the active list in the line of the Navy not below the grade of commanders, and the promotions were made from those who had eminently distinguished themselves by courage, skill, and genius in their profession. (See section 1365 of the Revised Statutes.) During peace vacancies in the grade of rear-admiral were filled by regular promotion from the list of commodores. (See section 1366 of the Revised Statutes.) By abolishing the grade of commodore and providing that the number of rear-admirals should be increased to 18, as is seen by section 7 of the act, twelve vacancies were created in the grade of rear-admiral.

Thus it will be seen that in order to fill all the

vacancies existing in the grade, it was necessary not only to advance the ten officers who had previously held the grade of commodore, but was further necessary to go to a grade still lower than commodore to complete the full complement of the eighteen rear-admirals. Congress undoubtedly realized that it would be unjust to the rear-admirals who were already in the grade, and who had rendered long and distinguished services, to suddenly advance these ten commodores, who were receiving the maximum pay of $5,000 per year, to a position commanding a compensation of $7,500 a year, to which the old rear-admirals became entitled by the passage of the act. By discriminating between the first and second nines of the eighteen rear-admirals for the purposes of pay and providing that the second nine should receive the same pay and compensation as a brigadier-general in the Army, Congress not only advanced these commodores to a dignity and grade that they had not previously enjoyed, but in addition advanced their compensation to a considerable extent. But in doing so the legislators clearly showed that it was not their purpose or intention to put these officers so suddenly advanced to higher dignity and grade upon the same footing, for the purposes of pay, as the old rear-admirals. It should be remembered that the vacancies to which we have referred in the list of rear-admirals were all vacancies created by section 7, and that the vacancies were made not necessarily for the purpose of providing places for officers who had eminently distinguished themselves by

courage, skill, and genius, as mentioned in section 1365 of the Revised Statutes, but for the purposes of a general reorganization of the line of the Navy. It would certainly seem unreasonable for us to conclude that Congress intended to make a sudden advancement of these ten commodores from a position of $5,000 per year to one of $7,500 per year and carrying with it the increased dignity and honor that a rear-admiral enjoys by reason of his position, and this without any other necessity than simply the filling of the vacancies existing in the class of rear-admirals, and, as we said, not necessarily by reason of the said commodores having distinguished themselves as described in section 1365 of the Revised Statutes.

If the appellant's attorneys are correct in their view of the purposes, objects, and intentions of the act, then by giving section 13 the construction contended for by them, there are no officers remaining in the Navy with the pay and compensation of a brigadier-general in the Army. Is it not reasonable to assume that Congress intended to preserve the relative rank, for the purposes of pay, between brigadier-generals in the Army and some corresponding officer in the Navy, and therefore preserved that relative rank for such purpose between the nine lower numbers of the eighteen rear-admirals and the brigadier-generals in the Army?

The authors of the "Navy personnel act" recognized the constant and rapid changes occurring in the personnel of the active list of rear-admirals by reason of death and retirement. Of the original six rear-admirals

upon the active list but three remain; of the number composing the first nine of the list as first constituted after the passage of the act, but five remain, the others having died or been retired. The first nine in the list is being constantly filled by advancement of those gentlemen who are upon the second nine of the list and in the natural line of promotion. The appellant in this case has been advanced until he now stands as sixth among the first nine of the list of eighteen rear-admirals and consequently is now drawing the compensation of a major-general, to wit, the sum of $7,500 a year. (See Register of the Navy.)

FIFTEEN PER CENTUM REDUCTION.

Appellant contends that inasmuch as the first proviso in section 7 makes no reduction from the pay of a rear-admiral by reason of shore service, he is entitled to the full pay of a brigadier-general from March 3, 1899, until June 30, 1899. Section 13, as has been seen, provides for pay of commissioned officers of the line of the Navy, and in the first provision of said section 13 makes a reduction of 15 per centum less pay when on shore duty. The opinion of the Court of Claims in passing upon this phase of the case presents a strong argument in favor of the Government's contention. The court says:

> The next question is, What deduction, if any, should be made from the claimant's pay while on shore duty, and when should such deduction begin—that is, whether from the date of the act, March 3, or after June 30, 1899?

Section 13 provides in express terms "that after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army." Hence, the proviso thereto fixing 15 per centum as the amount to be deducted from the pay of such officers when on shore duty, did not, of course, become operative as to those whose pay was so fixed until after that date, i. e., until after such officers became entitled to receive the pay and allowances therein provided for them.

But in respect to the rear-admirals "embraced in the nine lower numbers of that grade," though their pay is elsewhere provided for, they are nevertheless included among the commissioned officers referred to, and for that reason the proviso as to them became operative upon the passage of the act—that is, when they became entitled to receive the pay thus specially provided for them.

This construction is not only in harmony with the language of the two sections, but also with the long-established policy of the Government, continued in section 13, to pay officers in the Navy less when on shore duty than when at sea.

If the Congress had intended to except any of the commissioned officers referred to in section 13 from the operation of the proviso in respect to less pay for shore than for sea service

> they would have said so, and not having done so we can not add an exception thereto. Therefore our conclusion is that the pay of the claimant is fixed by the proviso to section 7, except that for shore service he will be entitled to "receive the allowances, but 15 per centum less pay than when on sea duty," as provided in said section 13.

We urge that the view expressed in the opinion of the Court of Claims harmonizes the two statutes under consideration, leaving both sections in full force and effect. Any apparent conflict is removed and the different sections, parts of sections, and provisos, in so far as they relate to or affect the pay of rear-admirals, form an intelligent and connected piece of legislation entirely consistent and in harmony with the needs and demands for such legislation, and we believe is a fair presentation of the intention of the legislators. Such interpretation is in accordance with the spirit and reason of the law and in accord with the preexisting body of the act of which these provisos and sections form a part.

EXECUTIVE CONSTRUCTION.

It is true that the act under consideration is of comparatively recent date and there has been but little time for it to receive judicial consideration, but in view of the references in appellant's brief to the opinions and interpretations given this statute by the Comptroller, we believe it will not be considered wholly inappropriate if we call attention to the construction which the statute received soon after its enactment and which

ever since has been and now is recognized by the Auditor of the Navy Department and the Comptroller of the Treasury. The Auditor of the Navy Department referred the question to the Comptroller of the Treasury for his opinion, and on April 29, 1899, the Comptroller held in accordance with the view we have presented in support of the Government's contention (See 5th Dec. of the Comp., p. 750.)

The Comptroller's opinion has been recognized and followed by the Auditor of the Navy Department ever since and the opinion of the Court of Claims supports the Comptroller in every respect.

Of course the contemporary construction given to the statute by an officer intrusted with its execution can not be adopted by the judiciary if contrary to the judicial construction; but where a statute is doubtful in its terms, much weight is usually given to the interpretation and construction placed upon it immediately after its passage by the officers having in charge the execution of the same.

This doctrine of "contemporaneous construction," though well recognized in its proper sphere, may not be applicable in this case; but, as before stated, we do not deem it inappropriate to present to the court the interpretation placed upon the statute by the Auditor of the Navy Department and the Comptroller of the Treasury.

COMMUTATION FOR QUARTERS.

As to appellant's claim for commutation for quarters at the rate allowed a major-general in the Army, we

presume it will not be questioned that it is controlled entirely by the decision of the court upon the former questions. If appellant, as rear-admiral in the second nine of the list of rear-admirals in the Navy, is entitled to the pay and allowances of a major.general in the Army from and after July 1, 1899, then we concede that appellant's claim for commutation for quarters should be allowed. But on the other hand, should the court sustain the Government's position upon the preceding questions and hold that the appellant, being one of the nine lower numbers of the list of rear-admirals, is entitled to pay at the rate of pay allowed a brigadier-general in the Army, then appellant's claim for additional allowance as commutation for quarters can not be sustained. The judgment of the court upon the questions first presented will control appellant's claim for commutation for quarters.

We respectfully submit that the judgment of the court below dismissing the petition should be affirmed.

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